

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTSFILED  
IN CLERKS OFFICE

2004 OCT 19 P 3:16

Wolverine Proctor &amp; Schwartz, Inc. :

:

and

:

Great American Alliance Insurance  
Co., Inc.,

:

Plaintiffs,

:

v.

CIVIL ACTION NO.

XYZ Tape Corp.,  
formerly known as Patco Corp.,

:

William B. Wilbur,

:

and

:

Travelers Property Casualty  
Company of America,

:

Defendants.

:

04-12189 WGY

MAGISTRATE JUDGE Bawly

RECEIPT # 59423  
 AMOUNT \$ 10 -  
 SUMMONS ISSUED Y  
 LOCAL RULE 4.1 \_\_\_\_\_  
 WAIVER FORM \_\_\_\_\_  
 MCF ISSUED \_\_\_\_\_  
 BY DPTY. CLK. gf  
 DATE 10-19-04

COMPLAINT AND JURY DEMAND

## INTRODUCTION

1. This diversity jurisdiction action seeks a declaratory judgment pursuant to 28 U.S.C. § 2201 and Fed. R. Civ. P. 57 and damages and equitable relief for breach of contract. The plaintiffs Wolverine Proctor & Schwartz, Inc. ("Wolverine") and Great American Alliance Insurance Co., Inc., ("Great American") seek a declaration whether indemnity contracts between Wolverine and defendant XYZ Tape Corp., formerly known as Patco Corp., ("XYZ Tape" or "Patco") entitle Wolverine to defense and

indemnity of claims asserted against it for property damages arising out of the operation of thermal oxidizer and heat recovery system equipment sold by Wolverine to Patco. Wolverine and Great American also seek a declaration whether the indemnity contracts are insured contracts within the meaning of a comprehensive commercial general liability policy that Travelers Property Casualty Company of America ("Travelers") issued to Patco, thereby requiring Travelers to extend insurance coverage to the liability, attorneys' fees, expenses and costs incurred or that may be incurred on behalf of Wolverine as a result of claims arising out of the operation of the equipment. Wolverine and Great American also seek damages and equitable relief for breach of the indemnity contracts.

**PARTIES**

2. Wolverine Proctor & Schwartz, Inc., is a Delaware corporation with a principal place of business at 51 East Main Street, Merrimac, Essex County, Massachusetts. For all purposes material to this complaint, it is the successor in interest to Wolverine (Massachusetts) Corporation and before that Wolverine Corporation (collectively "Wolverine").

3. Great American Alliance Insurance Co., Inc., ("Great American") is an Ohio corporation with a principal place of business at 45 East 4th Street, South Building, Cincinnati, Ohio 45202.

4. XYZ Tape Corp., formerly known as Patco Corp. ("XYZ Tape" or "Patco") for all purposes material to this complaint is or was a Rhode Island business corporation with a principal place of business at 128 Dorrance Street, Providence, Rhode Island that now subsists and may be sued for purposes of this action pursuant to Rhode Island General Laws § 7-1.1-98.

5. William B. Wilbur, a domiciliary of Rhode Island residing at 22 Stone Tower Lane, Barrington, Rhode Island, on information and belief for all purposes material to this complaint, is or was the president and sole shareholder of Patco and received or caused to be distributed assets of Patco such that he is or should be considered to be a trustee of such assets, a creditor of Patco, and/or otherwise as a holder of such assets that may be reached and applied to the satisfaction of a judgment in favor of Plaintiffs.

6. Travelers Property Casualty Company of America ("Travelers") is a Connecticut business corporation with a principal place of business at One Tower Square, Hartford, Connecticut 06183. On information and belief, The Travelers Indemnity Company of Illinois effective January 1, 2004, changed its name to or was merged into Travelers Property Casualty Company of America.

**JURISDICTION**

7. The Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332 and 28 U.S.C. § 2201 because the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between citizens of different states.

8. The Court has personal jurisdiction over the defendants pursuant to Fed. R. Civ. P. 4(e), 4(h) and 4(k) and Massachusetts General Laws ch. 223A, § 3, because for purposes material to this complaint the claims against Patco and/or Wilbur arise out of their transacting business in the Commonwealth of Massachusetts, including the solicitation for sale of goods and/or inspection and purchase of goods to which title transferred in Massachusetts; and because Defendants have or had substantial, continuous and systematic general business contacts with the Commonwealth of Massachusetts; and/or because the claims against Travelers arise out of its transacting business in the Commonwealth of Massachusetts, regularly engaging or soliciting business in the Commonwealth of Massachusetts, regularly engaging in other persistent course of conduct in the Commonwealth of Massachusetts, deriving substantial revenue from services rendered in the Commonwealth of Massachusetts, and/or involving the provision of insurance in

the Commonwealth of Massachusetts concerning risks at the time of contracting within the Commonwealth of Massachusetts.

9. The action against XYZ Tape is proper pursuant to Rhode Island General Laws § 7-1.1-98 because it concerns a civil action against XYZ Tape within two years of its October 22, 2002 dissolution for claims existing prior to XYZ Tape's dissolution and/or because dissolution is ineffective for failure to comply with the requirements of law.

10. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to this civil action occurred in this judicial district.

#### **FACTS**

##### **Patco Needs To Control Pollution From Its Manufacture of Tape**

11. At times material to this complaint, Patco manufactured pressure-sensitive adhesive tapes in a Rhode Island factory through a process that emitted solvent fumes containing flammable volatile organic compounds ("VOCs") and exhausted those fumes into the air outside its factory.

12. Patco's tape manufacturing process consisted of four steps: (1) applying flammable adhesive to a tape backing or "web" using a coating head machine; (2) drying the adhesive in an industrial oven that emitted VOCs as the tape cured; (3) winding up the film into rolls; and (4) cutting the rolls into narrow rolls of tape (the "process line").

13. Patco knew that an excessive concentration of VOCs in a confined area could result in a fire or explosion.

14. At times material to this complaint, Wolverine designed and manufactured pollution control devices known as thermal oxidizers. The thermal oxidizer, also known as a fume incinerator, burns otherwise harmful pollutants exhausted from industrial ovens and renders them inert.

15. Patco through its president William Wilbur contacted Wolverine in Massachusetts with respect to the purchase of a fume incinerator when it learned that permits required under the Clean Air Act Amendments of 1990 required Patco to purchase equipment to control the VOC pollution created as part of its tape manufacturing process.

**Fume Incinerator Contract**

16. By written proposal dated on or about January 22, 1991, Wolverine, then known as Wolverine Corporation, proposed to sell Patco a thermal oxidizer (the "fume incinerator"), an exhaust blower to convey exhaust from Patco's process line to the fume incinerator, an exhaust stack for the treated exhaust to vent to atmosphere, post fume incinerator ductwork including motorized dampers to regulate the processed hot gas feedback to Patco's process line, and a free-standing control panel (the "Fume Incinerator Equipment"). Patco accepted this proposal (the "Fume Incinerator Contract").

17. The Fume Incinerator Contract provided that the control panel included "all required interlocks, relays and alarms."

18. Interlocks or interlock contacts are the terminal blocks in an electrical control system designed to accept external electrical wiring to establish an electrical circuit with one or more control systems.

19. Interlocking is a process that involves making electrical connections between two or more control systems to establish electrical dependency between or among different control systems.

20. At the bottom of the first page of the Fume Incinerator Contract was the legend: "All orders based on this quotation are subject to the acceptance by Wolverine Corporation. The conditions on the reverse side form a part of this quotation."

21. The conditions on the reverse side of the first page of the Fume Incinerator Contract were entitled "Wolverine Corporation TERMS AND CONDITIONS" ("Terms and Conditions").

22. Section 6 of the Terms and Conditions stated in relevant part: "Buyer agrees to indemnify and hold Seller harmless from and against all liability, loss, cost, damage or expense attributable to any claim against Seller for personal injury or property damage arising out of the installation,

maintenance or operation of the Equipment by Buyer or others, whatever the cause or alleged cause of the personal injury or property damage may be."

23. Section 18 of the Terms and Conditions stated: "The Sales Agreement shall in all respects be governed by, and construed in accordance with, the laws of the Commonwealth of Massachusetts."

24. Patco's president William Wilbur and another Patco officer, agent or employee inspected the Thermal Oxidizer Equipment at Wolverine's factory in Merrimac, Massachusetts prior to shipment.

25. On April 17, 1991, Wolverine delivered the fume incinerator and related equipment covered by the Fume Incinerator Contract to Patco, F.O.B., a common carrier, in Merrimac, Massachusetts.

26. Patco, now XYZ Tape, and Wolverine entered into an enforceable contract in which Patco agreed to indemnify and to hold Wolverine harmless from and against all liability, loss, cost, damage or expense attributable to any claim against Wolverine for personal injury or property damage arising out of the installation, maintenance or operation of the Fume Incinerator Equipment by Patco or others, whatever the cause or alleged cause of the personal injury or property damage may be.

Heat Recovery Contract

27. By written proposal dated November 29, 1993, Wolverine, then known as Wolverine (Massachusetts) Corporation, proposed to sell to Patco a heat recovery system in two phases, including a filter box; hot gas ductwork and a hot gas blower including hot gas return dampers and pneumatic actuators; new exhaust ductwork; a heat exchanger and exhaust stack; a fresh air blower including inlet ductwork; a supply blower; ductwork and dampers for warehouse comfort heat including pneumatic actuators and temperature controller ("Heat Recovery Equipment"), which Patco accepted ("Heat Recovery Contract"). The Heat Recovery Equipment was intended to take the hot gas treated by the fume incinerator and, through the use of a heat exchanger, indirectly heat air blown from an outside fan that, among other things, would be used to heat Patco's industrial oven.

28. As did the Fume Incinerator Contract before it, the Heat Recovery Contract had at the bottom of the main page the following legend: "All orders based on this quotation are subject to the acceptance by Wolverine (Massachusetts) Corporation. The conditions on the reverse side form a part of this quotation."

29. The relevant conditions on the reverse side of the first page of the Heat Recovery Contract were the same

conditions as the Terms and Conditions included in the Fume Incinerator Contract including: "Buyer agrees to indemnify and hold Seller harmless from and against all liability, loss, cost, damage or expense attributable to any claim against Seller for personal injury or property damage arising out of the installation, maintenance or operation of the Equipment by Buyer or others, whatever the cause or alleged cause of the personal injury or property damage may be."

30. On or about March 1994 and December 1994, Wolverine arranged for the delivery the Heat Recovery System Equipment to Patco in two stages.

31. Patco, now XYZ Tape, and Wolverine entered into an enforceable contract in which Patco agreed to indemnify and to hold Wolverine harmless from and against all liability, loss, cost, damage or expense attributable to any claim against Wolverine for personal injury or property damage arising out of the installation, maintenance or operation of the Heat Recovery Equipment by Patco or others, whatever the cause or alleged cause of the personal injury or property damage may be.

**Travelers Provides Patco With CGL and Property Insurance**

32. Travelers Property Casualty Company of America issued to Patco, on information and belief, a comprehensive commercial general liability policy of insurance, Policy No. YJ630-190C7522, effective from December 31, 1999 to December

31, 2000, which included insured contract coverage ("CGL Policy").

33. Travelers Indemnity Company of Illinois ("Travelers Indemnity") issued to Patco, on information a belief, a property insurance policy that was effective, among other times, during January 2000.

**Travelers Indemnity Makes Claims Against Wolverine**

34. On January 29, 2000, while Patco was operating its process line as well as the Fume Incinerator Equipment and the Heat Recovery Equipment, a fire and/or explosion occurred inside Patco's Bristol, Rhode Island factory that caused Patco property damage (the "incident").

35. Individuals at Patco informed Travelers Indemnity that a failure of the Fume Incinerator Equipment and/or the Heat Recovery Equipment to exhaust VOCs caused the incident.

36. Beginning in March of 2000 and at various times thereafter, Travelers Indemnity, with the knowledge and consent of Patco, began making claims against Wolverine for property damage caused by the incident arising out of the alleged installation, maintenance or operation of the Fume Incinerator Equipment and/or Heat Recovery Equipment by Wolverine or others.

37. Travelers Indemnity commenced a civil action against Wolverine in the United States District Court for the District of Massachusetts captioned The Travelers Indemnity Company of

Illinois a/s/o Patco Corporation v. Wolverine (Massachusetts)  
Corporation, Civil Action No. 03-10164-RWZ (the "Travelers  
Indemnity Action"), alleging damages in the amount of  
\$977,321.32, plus interest, expenses, costs and attorney fees.

38. The Travelers Indemnity Action asserted three counts  
against Wolverine: negligence, strict liability, and breach of  
implied warranty as fully reflected in a true copy of the  
complaint attached hereto as Exhibit 1.

39. Travelers Indemnity, with the knowledge and consent of  
Patco, claims or has claimed that the damages attributable to  
the incident arose out of Wolverine's alleged installation of  
the Fume Incinerator Equipment in 1991 and/or Wolverine's  
alleged installation of the Heat Recovery Equipment on or about  
March 1993 and/or January 1995.

40. Travelers Indemnity, with the knowledge and consent of  
Patco, also claims or has claimed that the damages attributable  
to the incident arose out of the operation of the Fume  
Incinerator Equipment and/or Heat Recovery Equipment by Luis  
Toro and/or others on January 29, 2000. Travelers Indemnity  
claims that this incident occurred when Luis Toro shut off the  
power to the control panel of the fume incinerator, which panel  
was part of the Fume Incinerator Equipment. This, it asserts,  
caused the exhaust fan supplied with the Wolverine Fume

Incinerator Equipment to shut off, improperly causing the accumulation of combustible fumes that caused the incident.

41. For all purposes material to this complaint, Great American provided a defense to Wolverine of the Travelers Indemnity claims, including the Travelers Indemnity Action, in accordance with a contract of insurance between Great American and Wolverine, and is subrogated to the rights of Wolverine accordingly.

42. Significant expenses of over approximately \$263,377.13 have been incurred by Wolverine and/or on its behalf by its subrogee Great American in defending against Travelers Indemnity's claims, including the Travelers Indemnity Action, including, through September 30, 2004, attorney fee expenses of approximately \$235,930.00, consultant expenses of approximately \$6,290.32, and expert witness and other expenses of approximately \$21,156.81.

43. For all purposes material to this complaint, Wolverine and/or Great American as its subrogee has incurred and will continue to incur attorney fee expenses, consultant expert expenses, expert witness expenses and other expenses in defense of Travelers Indemnity's claims, including the Travelers Indemnity Action, and may incur further liability, loss or damage for a judgment of liability, if any, imposed against Wolverine in the Travelers Indemnity Action, that arises out of

the installation, maintenance or operation of the Fume Incinerator Equipment and/or Heat Recovery Equipment.

44. Liability of Travelers under the CGL Policy on account of the damage to property sustained by Wolverine and/or Great American for which XYZ Tape, formerly Patco, is responsible is reasonably clear under Massachusetts General Laws chapter 176D, § 3(9) and is fixed and absolute under Massachusetts General Laws chapter 175, § 112 as such damage has been incurred.

45. XYZ Tape, formerly Patco, despite notice and/or demand has not indemnified Wolverine and Great American, or either of them, and has not held harmless Wolverine and Great American, or either of them, as required by the Fume Incinerator Contract and the Heat Recovery Contract.

46. Travelers despite notice and/or demand has not properly acknowledged, acted reasonably promptly and/or accepted liability with respect to the claim of Wolverine and Great American, or either of them, as required by the CGL Policy and applicable law, but instead has forced litigation with respect to the claim though liability is reasonably clear.

COUNT I

Declaratory Judgment

47. Wolverine and Great American repeat their allegations and incorporate herein by reference paragraphs 1-46.

48. An actual and justiciable controversy exists between Plaintiffs and XYZ Tape as to whether XYZ Tape owes Wolverine and/or Great American a duty to indemnify and to hold harmless Wolverine and/or Great American from and against the liability, loss, cost, damage or expense attributable to Travelers Indemnity's claims against Wolverine for property damage arising out of the installation, maintenance or operation of the Fume Incinerator Equipment and/or the Heat Recovery Equipment.

49. Wolverine and Great American have standing to bring this declaratory judgment action and all necessary parties have been joined in this action.

50. The controversy that exists between Plaintiffs and XYZ Tape limits the rights of Wolverine such that Wolverine will suffer irreparable harm if the controversy concerning the indemnity obligation is not determined prior to the trial of the Travelers Indemnity Action.

COUNT II

Declaratory Judgment

51. Wolverine and Great American repeat their allegations and incorporate herein by reference paragraphs 1-50.

52. Travelers Property Casualty Company of America owes Wolverine and/or its subrogee Great American a duty not to engage in unfair or deceptive business practices with respect to their claim prohibited by Massachusetts General Laws chapter 93A, including but not limited to those unfair claims handling or claims settlement practices prohibited by Massachusetts General Laws chapter 176D, § 3(9), and may not engage in such practices by claiming an artifice of alleged corporate distinctiveness with respect to The Travelers Indemnity Company of Illinois when, on information and belief, such entities have merged; have engaged in joint enterprises, ventures or combinations with respect to relevant multi-line insurance products, coverages or claims, including the marketing of same; and/or have made representations sufficient to create a partnership by estoppel between them.

53. An actual and justiciable controversy exists between Plaintiffs and XYZ Tape and Travelers Property Casualty Company of America as to whether coverage is afforded by the CGL Policy by virtue of the indemnity agreements in the Fume Incinerator Contract and/or the Heat Recovery Contract and whether XYZ

Tape's liability to Wolverine under those indemnity agreements for attorney fee expenses, consultant expenses, expert witness expenses, and other expenses, including but not limited to those attributable to the defense of the strict liability and breach of warranty counts in the Travelers Indemnity Action, as well as the potential liability of Wolverine with respect to a judgment against it, if any, in the Travelers Indemnity Action is reasonably clear.

54. Wolverine and Great American have standing to bring this declaratory judgment action and all necessary parties have been joined in this action.

55. The controversy that exists between Plaintiffs and XYZ Tape and Travelers Property Casualty Company of America limits the rights of Wolverine such that Wolverine will suffer irreparable harm if the controversy concerning insurance coverage is not determined prior to the trial of the Travelers Indemnity Action.

### COUNT III

#### Breach of Contract

56. Wolverine and Great American repeat their allegations and incorporate herein by reference paragraphs 1-55.

57. XYZ Tape has breached duties owed to Wolverine under the Fume Incinerator Contract and/or the Heat Recovery Contract.

58. XYZ Tape's breach of its contracts has caused Wolverine and its subrogee Great American substantial damage, including but not limited to substantial expenses incurred and that will continue to be incurred in defense of Travelers Indemnity's claims and would damage Wolverine and/or its subrogee Great American in an amount of a judgment, if any, imposed against Wolverine in the Travelers Indemnity Action.

**REQUEST FOR RELIEF**

59. WHEREFORE, Wolverine and Great American respectfully request that the Court:

- a. Adjudicate the controversies that have arisen among the parties and make a binding declaration of the rights, duties and obligations of the parties;
- b. Order and declare as follows:
  1. XYZ Tape owes Wolverine and Great American a duty to defend and to indemnify Wolverine and Great American for all attorney fee expenses, consultant expenses, expert witness expenses, and other expenses attributable to defending against (i) Travelers Indemnity's claims, (ii) the strict liability and breach of implied warranty counts of the Travelers Indemnity Action, and (iii) the negligence count of the Travelers Indemnity Action;

2. The Fume Incinerator Contract and the Heat Recovery Contract are insured contracts under the terms of the Travelers Property Casualty Company of America Policy;

3. The allegations and contentions of Travelers Indemnity with respect to its claim and in the Travelers Indemnity Action state or adumbrate a claim that arises out of the installation and/or operation of the Fume Incinerator Equipment or the Heat Recovery Equipment;

4. Travelers Property Casualty Company of America must extend coverage provided by its policy for payment of all attorney fee expenses, consultant expenses, expert witness expenses, and other expenses attributable to defending against (i) Travelers Indemnity's claims, (ii) the strict liability and breach of implied warranty counts of the Travelers Indemnity Action, and (iii) the negligence count of the Travelers Indemnity Action;

5. Travelers Property Casualty Company of America must extend coverage provided by its policy to a judgment of liability, if any, imposed against Wolverine in the Travelers Indemnity Action;

- c. Enter a judgment against XYZ Tape to compensate Wolverine and Great American for the damages, including all attorney fee expenses, consultant expenses, expert witness expenses, and other expenses attributable to and caused by XYZ Tape's breach of contract;
- d. Order that all assets of XYZ Tape distributed as the result of or in the course of its dissolution to the shareholders of XYZ Tape or others be held in trust, be reached and applied, and/or be submitted into Court for the satisfaction of a judgment in favor of Wolverine and/or Great American;
- e. Award Wolverine and Great American all appropriate costs, expenses, attorneys' fees and interest authorized by law; and
- f. Award Wolverine and Great American such other relief deemed just and proper.

**JURY TRIAL DEMAND**

Plaintiffs demand a trial by jury on all issues so triable.

Respectfully submitted,

Wolverine Proctor & Schwartz, Inc.  
Great American Alliance Insurance Co., Inc.

By its attorneys,



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